Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

No. 77-1148

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROOSEVELT THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

JOHN C. KEENEY,
Acting Assistant Attorney General,

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1448

ROOSEVELT THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. i-vi) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1978. The petition for a writ of certiorari was filed on April 11, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied petitioner's motion to suppress evidence seized from his automobile.

STATEMENT

Following a jury-waived trial in the United States District Court for the Southern District of California, petitioner was convicted of conspiracy to possess heroin with intent to distribute (21 U.S.C. 846) and possession of heroin with intent to distribute (21 U.S.C. 841(a)(1)) (IV R. 62).[1] He was sentenced to a concurrent term of ten years' imprisonment and ten years' special parole on each count (II R. 35). The court of appeals affirmed (Pet. App. i-vi).

The evidence at trial showed that in January 1977 Agent Michael Groseclose of the Drug Enforcement Administration received a report from customs agents that on January 7 petitioner had entered the United States from Mexico at Calexico, California, and had remarked to customs inspectors that if they wished to follow him he would be staying at the Holiday Inn in El Centro, California, a town near the Mexican border. Agent Groseclose thereafter spoke with other D.E.A. agents and learned that petitioner had been in the El Centro area twice in the previous two months, and he discovered from a review of the D.E.A. files that a suspect in another case had named petitioner as the recipient of 15-20 kilograms of heroin from the suspect's husband each month. In addition, Agent Groseclose obtained copies of the toll records for petitioner's home telephone, which revealed that petitioner's monthly bill was between $300 and $400 and that several of the numbers called were associated with known heroin traffickers in California, Florida, and

[1]"R." refers to the record in the court of appeals. Co-defendant Ernest Slocum was convicted only on the conspiracy charge. Slocum also has filed a petition for a writ of certiorari (No. 77-6432), which raises a wholly unrelated claim.

Georgia. The telephone records showed calls between January 7 and 11 to the El Dorado and Easy Night Motels in El Centro (III R. 4-9).

On February 27, 1977, Agent Groseclose was told by a confidential informant that petitioner again was in the El Centro area. The agent checked the El Dorado Motel, determined that petitioner had registered there, and began a surveillance. Shortly thereafter petitioner left the motel, drove about a mile to a public telephone and made a call (although there were public telephones at the motel and a private phone in each motel room), visited two stores (both times leaving without a package), and then returned to the motel (III R. 9-12, 51-52).

At approximately 11:00 a.m. on February 27, petitioner and co-defendant Slocum checked out of the motel and proceeded east on Interstate 8 at a speed of 40-45 miles per hour in a 55 m.p.h. zone. After about 15 miles, their car pulled off the road and parked in a gas station, from which the two men scanned the eastbound traffic. Fifteen minutes later, petitioner and Slocum returned to the highway and again proceeded east, next stopping at a rest area 12-15 miles west of Yuma, Arizona. Once more the car was parked in such a way as to give the men a view of the eastbound traffic. Petitioner and Slocum remained at the rest area for 45 minutes, although neither used the restroom.[2] They then continued on to Yuma (III R. 12-15, 53-54).

Upon arriving in Yuma, petitioner and Slocum drove in a circuitous route before eventually stopping at a park, where they remained for 30-45 minutes. Next the men went to a shopping center, where petitioner entered a

[2]Agent Groseclose testified that he believed these stops were made for the purpose of detecting surveillance (III R. 16).

department store and returned a few minutes later with a brown paper bag. From there they drove to another shopping center, where petitioner again visited several stores in a short period of time. Petitioner and Slocum then returned to the department store and parked in the rear of the store near a car bearing Mexican license plates. As one of the agents approached the car to get a better view, he observed a male Mexican walking away from the car (III R. 15-19, 54-59).

A few minutes later, petitioner and Slocum drove back to the highway and headed west toward El Centro at a speed of 55-60 m.p.h. Throughout the return trip Slocum drove the car and petitioner slouched down in the rear seat. After the car left the highway at El Centro, it stopped and petitioner placed a pink bag into the trunk and got into the front seat (III R. 19-20, 59-60).

Agent Groseclose and Agent John Pulley determined to stop petitioner's car a short while later. Prior to the stop, but after the agents had turned on their red light and siren, Agent Groseclose observed petitioner making movements in the middle of the front seat. The agent walked to the car, identified himself, told petitioner and Slocum that he was investigating possible narcotics smuggling, and asked the men to step out of the car. In response to Agent Groseclose's questions, petitioner stated that he was coming from El Centro, that he was going to visit his aunt, and that he was not sure of the identity of his companion. Agent Pulley then questioned Slocum, determined that the car belonged to him, and obtained his consent to search the vehicle.[3] Agent

[3]Agent Pulley's testimony regarding his colloquy with Slocum was as follows (III R. 75-76):

> Q. What, if anything, did you say to Mr. Slocum?
>
> A. I asked him to step out of the car, and he did. We walked back to the back of his car, and I identified myself with my credentials, and told him we were conducting a narcotic investigation. I asked him whose car it was. He said it was his. I had heard a vehicle registration check earlier in the day, and it was my understanding the vehicle was registered to someone else. I asked him, did he own the car, and he said, "Yes." And I asked him, did he recently purchase it, and he said, "Yes." I asked him if he had any contraband in the car, and he said, "No." And I said, "Well, I'd like to ask permission to search the car." I said, "But you are not required to permit me to search," and I said, "You have the alternative to deny me permission to search." And he said, "No, go ahead and search it if you want to."

Groseclose also asked petitioner if he would consent to a search; petitioner responded that it was Slocum's car and that if Slocum did not object to a search neither did he (III R. 21-23, 60-61, 74-76).

A search of the front seat of the car revealed a film cannister that smelled of acetic acid or heroin and a small quantity of brown powder that appeared to be heroin. Petitioner and Slocum were then arrested and advised of their constitutional rights. A search of the trunk of their automobile produced a pink bag containing two packages of heroin (III R. 23-24, 27, 77-78).

ARGUMENT

1. Relying on *United States* v. *Chadwick*, 433 U.S. 1, petitioner contends (Pet. 6-7) that the search of the bag found in the trunk of the car violated the Fourth Amendment. In *Chadwick*, this Court held that federal law enforcement agents who had arrested several suspects, seized a locked footlocker, and transported it to the agents' offices, were required to obtain a warrant before searching its contents. The Court concluded that once the agents had seized the footlocker, gained "exclusive dominion" over it, and arrested its owner, there was no exigency requiring an immediate search, nor was any

other recognized exception to the warrant requirement applicable, and a warrantless search was therefore unreasonable (433 U.S. at 11-16).

Chadwick, however, did not purport to alter the settled rule permitting a warrantless search with the consent of a person having a sufficient relationship to the premises or effects sought to be searched. See *United States* v. *Matlock*, 415 U.S. 164, 171. On the contrary, the Court emphasized in *Chadwick* that no consent to search had been obtained in that case (433 U.S. at 4). Here, by contrast, both courts below found that petitioner and Slocum voluntarily consented to the search of the car, a finding amply supported by the evidence and, indeed, one that petitioner does not dispute. In light of this consent, the agents were permitted to open the trunk of the car and to search the contents of the pink bag. See *United States* v. *Matlock*, *supra*, 415 U.S. at 166; *United States* v. *Carter*, 569 F. 2d 801, 804 (C.A. 4) (collecting cases).[4]

2. Petitioner suggests (Pet. 7-8) that the agents arrested him without probable cause when they stopped his vehicle. This claim is insubstantial. Law enforcement officers may stop an automobile to question its occupants without effecting an arrest. *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884; *Terry* v. *Ohio*, 392 U.S. 1. Here, the agents plainly had a reasonable suspicion that criminal activity was afoot. Moreover, there was testimony that petitioner and Slocum were free to leave

[4]The search of the trunk also was permissible under the "automobile search exception" to the warrant requirement. See *United States* v. *Chadwick*, *supra*, 433 U.S. at 12; *Chambers* v. *Maroney*, 399 U.S. 42. The agents had probable cause to believe that the trunk contained contraband, since they had already found heroin in the front seat and had seen petitioner place the pink bag in the trunk under suspicious circumstances. See also 21 U.S.C. 881.

prior to the search (III R. 68). Accordingly, the court of appeals correctly concluded that "the conduct of the agents did not constitute an arrest" (Pet. App. v). Cf. *Pennsylvania* v. *Mimms*, No. 76-1830, decided December 5, 1977.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JOHN C. KEENEY,
Acting Assistant Attorney General.

JEROME M. FEIT,
ANDREW S. GORDON,
Attorneys.

MAY 1978.

DOJ-1978-05